A Chapter 7 Trustee’s Abandonment of Environmentally-Impaired Property: Midlantic, Post-Midlantic Interpretation and the Plague of Results-Oriented Legal Analysis

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INTRODUCTION

Bankruptcy. The word conjures up several images in the minds of laymen, none of them very flattering. Of course, there is the image of the deadbeat individual who foolishly went way beyond his means, and is now getting rewarded for irresponsibility. There is also the image of a "down-and-out" company that was deservedly punished for its fiscal incompetence, only now to be resurrected at the expense of innocent other parties. There is the image of a greedy group of bankruptcy lawyers standing over a copy of the Bankruptcy Code (Code),\(^1\) heads bowed, paying homage to that which has put food in their mouths and BMWs in their driveways. Although this cynicism is unwarranted, the perception of abuse is still something that Congress and the courts cannot ignore. It calls into question the legitimacy and goals of our legal system itself. No wonder our legislators and judges have been troubled by a new development on the horizon: the rush of environmental polluters filing for bankruptcy.\(^2\)

It seems right that if an individual or corporation has created an environmental hazard, its fulfillment of any legal obligations to allevi-

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ate the danger to the community should be a priority. However, in the name of the "fresh start" and the equitable treatment of creditors, the Bankruptcy Code has provided several debtor protections that appear to shield a polluter from its environmental liabilities.\(^3\) One of these controversial provisions is Section 554, which allows the trustee of a bankruptcy estate to "abandon" economically burdensome property.\(^4\) The provision creates an apparent conflict. By abandoning property containing hazardous waste and thereby minimizing the drain of funds from the estate, the interest of the debtor and many of its creditors is furthered. The government, as overseer of the public interest, has reacted by trying to hold the offending party accountable and force adherence to the law.\(^5\)

As with other issues, a test case was needed, one that would allow the United States Supreme Court to finally determine who would prevail. In 1986, such a case appeared on the horizon. *Midlantic National Bank v. New Jersey Department of Environmental Protection*\(^6\) should have answered all the questions, and foreclosed existing debate on the abandonment dilemma. Unfortunately, the landmark decision still left the legal landscape muddled and all interested onlookers in a state of confusion.

Part I of this Note provides a brief outline of how federal and state governments enforce environmental obligations. Much of this discussion will focus on the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund).\(^7\) This approach is appropriate not only because of CER-

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\(^3\) Ballantine, *supra* note 2, at 572 (citing Kokoszka v. Bedford, 417 U.S. 642, 645-46 (1977)). As Ballantine points out though, "the 'fresh start' policy is not applicable to corporate debtors because the 1978 [Bankruptcy Reform] Act does not contain a provision for the discharge of debts of non-individuals." Ballantine, *supra* note 2, at 572 n.9.


\(^5\) The view that environmental law and bankruptcy policy are in irreconcilable conflict is not espoused by all. See generally Douglas G. Baird, *Environmental Compliance, Permitting and Cleanup Obligations: To What Extent Should They Take Precedence Over Other Obligations During and After Bankruptcy?*, 18 ENVTL. L. REP. 10,332 (A.B.A.) (1988); Thomas H. Jackson, *Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules*, 60 AM. BANKR. L.J. 399 (1986); Cosetti & Friedman, *supra* note 2, at 67 ("We believe that the [Midlantic] Court incorrectly perceived a conflict between the Bankruptcy Code and state environmental law. We do not perceive such a conflict.") (emphasis added).

\(^6\) 474 U.S. 494 (1986).

CLA's powerful role as the *de facto* "Federal Environmental Attorney General," but also because many states have based their own environmental laws on this regulatory scheme.

Part II addresses the history of abandonment in the bankruptcy context before *Midlantic*. The story is one of continual evolution, a growing legislative and judicial acceptance of the practice conditioned only upon a legitimate "cost-benefit" analysis by the Chapter 7 trustee. 8

However, the strength of legal consensus is never a match for the discretionary power of the United States Supreme Court. As will be discussed in Part III, the Court in *Midlantic* turned its back on justifiable statutory interpretation and the well-reasoned decisions of the lower courts when it created an environmental "exception" to a Chapter 7 trustee's traditional abandonment power. In the process, the Court has left itself vulnerable to criticism by those legal "rebels" who take the language of the Code seriously and those who have not lost sight of what bankruptcy is really about.

When a Chapter 7 trustee petitions the bankruptcy court to abandon a hazardous waste site, judges are expected to reconcile the facts according to principles of *stare decisis*. However, the open-endedness of Justice Powell's language makes the job a difficult one. In the process of applying *Midlantic*, courts have been taking the easy way out by blatantly distorting the *Midlantic* mandate to achieve the "results" they desire. Part IV outlines the direction of this post-*Midlantic* case law.

Part V suggests a decision-making model that judges can apply when faced with a fact pattern analogous to *Midlantic* and its progeny. This test to resolve the abandonment puzzle, unlike the process adhered to by the post-*Midlantic* courts, is justifiable because it properly adheres to *Midlantic* without losing sight of what bankruptcy is really trying to accomplish.

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8. This Note's emphasis will be on abandonment by a Chapter 7, rather than a Chapter 11 trustee. As Jackson observes: "we will have to concern ourselves with whether we should treat liquidation cases [Chapter 7] fundamentally different from continuation [Chapter 11] cases." Jackson, *supra* note 5, at 406. This author agrees with Jackson that there should be differing treatment. *Id.* ("In continuation cases [unlike instantaneous liquidations], we have to deal with the debtor's post-bankruptcy period and relate that to the issues already set out."). Since this Note is making an argument in the context of *Midlantic*, a Chapter 7 case, and given the distinctions between the two types of proceedings, concentrating on the liquidation scenario is both easier and probably more useful. See Perkun, *supra* note 2, at 1568 n.53 ("Trustees in charge of hazardous waste properties usually can abandon only in liquidations because 28 U.S.C. § 959 (1988) precludes it in reorganizations if so doing would amount to illegal waste disposal.").
I. Government Enforcement of Environmental Obligations

Two kinds of laws comprise the heart of the federal government's prompt and effective response to the dangers of hazardous waste. There are "preventive" statutes such as the Clean Air Act, the Clean Water Act, and the Resource Conservation and Control Act which regulate the activities of potential polluters. Then there is CERCLA, the more "activist" form of environmental regulation. This "damage-control" statute presupposes that there has already been some violation of an applicable environmental law "through threatened or actual releases, spills or discharges of hazardous substances at existing or abandoned sites." If these circumstances constitute "an imminent and substantial danger to the public health or welfare," the Environmental Protection Agency can obtain injunctions and issue administrative orders that require the polluter to spend its own money to abate the hazards. Under these "dire" conditions, the agency also has the option of conducting its own clean up.


10. 33 U.S.C. §§ 1251-1387 (1988); see Mirsky et al., supra note 9, at 681-83 (synopsis of the provisions).


14. Daniel Klerman, Note, "Earth First? CERCLA Reimbursement Claims and Bankruptcy," 58 U. Chi. L. Rev. 795, 797 (1991) (citing 42 U.S.C. § 9606(a) (1988)). An important point made by Klerman is that "courts have facilitated the use of these remedies by liberally interpreting the 'imminent and substantial endangerment requirement'" Id. at 798 (citing several cases, including United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985)). This standard has been satisfied "whenever hazardous substances have been released, even if the feared harm may not materialize for several years." Id.

15. Losch, supra note 12, at 139-40 (citing 42 U.S.C. §§ 9601(23), (24) (1988)). Losch tries to emphasize that the clean up actions authorized by CERCLA are not boundless, because they are limited to "removal" and "remedial" measures. Id. The provision defines "remedial" measures as the cleanup or removal of released hazardous substances from the environment as may be necessary in the event of the threat of release of hazardous substances into the environment [and as may be] necessary to monitor, assess, and evaluate the release or threat of release . or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage.

Id. (quoting 42 U.S.C. § 9601(23)). "Remedial" is defined as "those actions consistent with permanent remedy taken instead of, or in addition to, removal actions." Id. (quoting 42 U.S.C. § 9601(24)(1)). This terminology is clearly not restrictive at all, in
If the second option is taken, a cost recovery action may be brought against any "potentially responsible party" (PRP) by the federal government or a private party for the costs expended in its clean up.\textsuperscript{16} The particular costs that can be recovered from any of the PRPs include necessary response costs incurred by the government or by non-governmental parties consistent with the National Contingency Plan (NCP), damages to natural resources and the costs of assessing those damages, and health assessment costs authorized under CERCLA.\textsuperscript{17}

As soon as CERCLA was passed in 1980, its strong enforcement measures were criticized for being overly harsh. For example, the imposition of strict liability without a showing of negligence was considered extreme.\textsuperscript{18} The cries grew louder in 1986 when Congress passed a number of amendments strengthening CERCLA,\textsuperscript{19} including one that gave the EPA "a lien on all property belonging to the PRP that is subject to or affected by the removal or remedial action."\textsuperscript{20}

fact, conferring upon the agency enormous discretion to attack past, present and future harm.

16. Losch, supra note 12, at 139-40 (citing 42 U.S.C. § 9607(a) (1988)). A PRP can include:

(1) [the] owner and operator of a vessel or facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

42 U.S.C. § 9607(a) (1989). It is important to remember that for liability to be assessed, the actual cleanup must be completed. Van Patten & Puetz, supra note 11, at 226 (citing 42 U.S.C. § 9607(a)(4)(B) (1989)).

17. Losch, supra note 12, at 140 (citing 42 U.S.C. § 9611(a) (1989)).

18. Id. at 141. CERCLA does not expressly provide for strict liability, but the courts have had no problem imposing such a threshold. Kahn, supra note 2, at 2001-02 n.15 (citing United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted [CERCLA] section 107(a) as establishing a strict liability scheme.")., cert. denied, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [congressional] compromise.").).


20. Losch, supra note 12, at 140 (citing 42 U.S.C. § 9607(1) (1988)). This federal lien, created to ensure that the EPA would be able to collect cleanup costs from bankrupt polluters, attaches "when the costs are incurred or when the owner is given notice of potential liability." Van Patten & Puetz, supra note 11, at 227 (citing 42 U.S.C. §§ 9607(1), (2) (1989)). Prior to this time however, "the lien is subject to the rights of any prior purchaser, holder of a security interest, or judgment lien creditor, as perfected under state law." Cosetti & Friedman, supra note 1, at 100. It should be obvious then, as Cosetti and Friedman write, "[t]his low priority provided is not likely to
Despite the seeming omnipotence of CERCLA and its accompanying federal legislation, states still felt that it did not adequately meet their environmental and financial needs. They responded by enacting environmental legislation modeled after the federal acts, which gave the state environmental agency "activist" regulatory power similar to the EPA. In a move analogous to the creation of the CERCLA lien, at least seven states, motivated by the same desire to have some form of "bankruptcy insurance," have also passed legislation that grants the state a priority lien against the debtor. Through use

be valuable." Id. The EPA is faced with another problem in situations where the EPA incurs clean up costs after the bankruptcy petition has been filed. Section 544(a) of the Code makes liens arising post-petition, and thus these particular CERCLA liens, avoidable. Kahn, supra note 2, at 2008-09 n.46. The First Circuit has side-stepped the issue of the efficacy of the CERCLA lien within the bankruptcy framework by declaring the lien unconstitutional. Id. at 2009 n.46 (citing Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991)).


23. See Mirsky ET AL., supra note 9, at 688-89 n.22 (citing CONN. GEN. STAT. ANN. § 22a-452a (Supp. 1989); ILL. STAT. ANN. § 1021.3 (Supp. 1989); N.H. REV. STAT. ANN. § 147-B:10-b (Supp. 1986); N.J. STAT. ANN. § 58:10-23.11(f) (Supp. 1989); Me. REV. STAT. ANN. tit. 38 § 1371 (Supp. 1988); Mass. Gen. LAWS ANN., Ch. 21E, § 13 (1988); Tex. REV. CIV. STAT. ANN. art. 4477-7 § 13(g)(7)). Two states, Arkansas and Tennessee, "[r]ecently [re]pealed the super priority provisions of their lien laws, leaving instead only a non-priority environmental lien." William J. Hamel, The Great Superlien Scare Finally Over?, ENV'T REP. (BNA), August 31, 1990, at 853. As Hamel mentions, "[n]on-priority liens are not as feared [by lenders and potential purchasers] as superliens . . . because they take precedence over all claims except those secured by a prior perfected security interest." Id. The non-priority liens are more prevalent than their superlien counterparts. Id. ("Seventeen states have now some sort of non-priority environmental lien law."). It is clear that the incentive to create both types of liens was provided by the Supreme Court in Ohio v. Kovacs, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring) ("A State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims.").
of these "superliens," the lienholder (the state) can collect its reimbursement costs for cleaning up a hazardous waste site before the other creditors are paid.24


Undoubtedly, one of the "bankruptcy disasters" that the federal and state government wanted to insure themselves against was abandonment. Put succinctly, abandonment is "a divestiture of all interests in property that were property of the estate."25 It is clear that "the principle of abandonment was developed by the courts to protect the bankruptcy estate from the various costs and burdens of having to administer property which could not conceivably benefit unsecured creditors of the estate."26 Until 1978, the Chapter 7 trustee lacked express statutory authority to abandon burdensome estate property.27 Despite this, history has been on the trustees' side.

A. The History of Abandonment Before Midlantic

At the turn of the century, it was generally accepted that abandonment of burdensome property was simply a logical extension of the trustee's common law power to reject executory contracts, and should be authorized.28 Within the Bankruptcy Act of 1898,29 relevant provisions did not definitively recognize this abandonment threshold.30 However, by allowing the abandonment of property weighed down by taxes, patent applications, trademarks and executory leases, a trend toward liberal treatment was taking shape.31 Courts began to echo these pro-abandonment sentiments, utilizing the case law and the statute to craft an implicit legal realization of the trustees' abandonment desires.32 This judicial creation "served the overriding purpose of

24. Ballantine, supra note 2, at 573. See generally id. at 573-85 (for a discussion of the Takings Clause and Contracts Clause questions raised by these priority liens); see also Ellen E. Sward, Resolving Conflicts Between Bankruptcy Law and the State Police Power, 1987 Wis. L. Rev. 403, 439-41 (explaining the practical problems with attaching the superlien that makes it an unsatisfactory solution for states trying to recover cleanup costs).
27. 4 COLLIER ¶ 554.01 at 554-1 to -2; Midlantic, 474 U.S. at 508.
28. 4 COLLIER ¶ 554.01 at 554-2.
30. 4 COLLIER ¶ 554.01 at 554-1 n.1. (describing §§ 64a(4), 70a(2), and 70b of the Act).
31. Id.
32. See Perkins, supra note 2, at 1564 (citing First Nat'l Bank v. Lasater, 196 U.S. 115, 118 (1905); Dushane v. Beall, 161 U.S. 513, 515 (1896); American File Co. v. Garrett, 110 U.S. 288, 295 (1884); Gochenour v. Cleveland Terminal Bldg. Co., 118 F.2d 89, 94 (6th Cir. 1941); Federal Land Bank v. Nalder, 116 F.2d 1004, 1007 (10th Cir.), cert. denied, 313 U.S. 578 (1941); Stanolind Oil & Gas Co. v. Logan, 92 F.2d 28,
bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors."

Finally, there was the codification of the common law rule in the Bankruptcy Code of 1978, amended in 1984: "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." The clear language of section 554(a), coupled with the lack of legislative history addressing the scope of the trustee's abandonment power, seemed to indicate only one thing: the trustee's cost-benefit analysis should be the sole consideration in abandonment decisions. If the test yielded the conclusion that the property was burdensome or inconsequential to the estate to the detriment of the unsecured creditors, the property would and should be abandoned by the Chapter 7 trustee. The commentators and cases appeared to be satisfied with such a result.

31 (5th Cir. 1937), cert. denied, 302 U.S. 763, and cert. denied, 303 U.S. 636 (1938); Central States Life Ins. Co. v. Koplar Co., 80 F.2d 754, 757-58 (8th Cir. 1935), cert. denied, 298 U.S. 687 (1936); Lincoln Nat'l Life Ins. Co. v. Scales, 62 F.2d 582, 585 (5th Cir. 1933); Quinn v. Gardner, 32 F.2d 772, 773 (8th Cir. 1929).

33. Midlantic, 474 U.S. at 508 (citing Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930)); see also Katchen v. Landy, 382 U.S. 323, 328 (1966); 4 COLLIER 554.01 at 554-2 to -3).

34. 11 U.S.C. § 554(a) (1993); see 2 COWANS BANKRUPTCY LAW & PRACTICE § 9.9 at 80-81 (Daniel R. Cowans et al. eds., 1989) ("The trustee has a duty to investigate values and liens where the contention is that there is no equity in the estate and to make a showing upon which a court may base its order.") (emphasis added) [hereinafter COWANS]. According to one commentator, "'[b]urdensome' property is property that is essentially worthless because it is heavily subject to taxes, liens, or other encumbrances, while 'inconsequential' means the debtor lacks equity in the property." Ballantine, supra note 2, at 578. The distinction between inconsequential "value" and inconsequential "benefit" in the provision should also not be ignored. 2 COWANS § 9.9 at 79; see also In re K.C. Mach. Tool Co., 816 F.2d 238, 245 (6th Cir. 1987).

35. The legislative history states: "[u]nder this section the court may authorize the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. Abandonment may be to any party with a possessory interest in the property abandoned." S. REP. No. 989, 95th Cong., 2d Sess. 92 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5878.

36. See Perkins, supra note 2, at 1563 n.1 ("Neither the Bankruptcy Code nor Bankruptcy Rule 6007 places a time limitation on the trustee [for abandoning]. Under the pre-code rule, however, the trustee had to abandon within a reasonable time.").

37. Cosetti & Friedman mention that

[p]rior to Midlantic and Quanta Resources, the two well-recognized bankruptcy treatises, "Norton Bankruptcy Law & Practice" and "Collier on Bankruptcy," do not mention any public health and safety exception to abandonment under section 554(a) that is based on state law. Professor Norton notes that "[i]f the best interests of the estate and not the interests of the debtor and creditors will determine whether property should be abandoned."

Cosetti & Friedman, supra note 2, at 75 (citation omitted).

As for the environmental cases supporting the strict construction view of the Code's abandonment provision, none stands out more than the often-cited Kovacs,
B. The Current Statutory Mechanism

The same cannot be said for the state and federal governments, which saw abandonment as a device that would destroy any chance for enforcement of environmental orders and the possible recovery of hazardous waste cleanup costs. When a Chapter 7 petition is filed either voluntarily by the debtor, or involuntarily by the debtor's creditors, the proceeding commences and a bankruptcy estate "separate and distinct from the debtor is created." The "legal or equitable interests of the debtor in property" are then absorbed by the estate. A trustee is appointed to sell off these "assets" for the ultimate benefit of the debtor's unsecured creditors. That is the trustee's job and is usually the trustee's only concern. For a Chapter 7 trustee overseeing an estate saddled with orders to comply with environmental laws and bills for the cleanup of hazardous wastes that cannot be paid, it is inevitable that the legal sanction to "abandon" burdensome property will be crucial in the successful administration or disposition of the estate's liabilities.

Following abandonment of the contaminated property by a Chapter 7 trustee, the EPA and state agencies cannot be sure that their costs will be reimbursed as first-priority administrative expenses. There is a strong likelihood that the governments will be holding an unsecured claim against the estate worth the proverbial "twenty cents on the dollar" when the assets are finally distributed. Thus, the state and federal governments are left with the dual problem of property that is still

42. In a Chapter 7 case, after the order for relief (i.e., when the petition is filed), an interim trustee must be chosen by the United States trustee. 11 U.S.C. § 701(a)(1) (1993). The interim Chapter 7 trustee will then become the permanent trustee unless another person is elected at the § 341 creditors meeting. 11 U.S.C. §§ 341, 702(d) (1993).
43. 11 U.S.C. § 704(1) (1993) (among other duties, the Chapter 7 trustee is obligated to "collect and reduce to money the property of the estate and close such estate as expeditiously as is compatible with the best interests of parties in interest ").
threatening public health and a bill that is only partly paid. As the process continues, the offending property is irrevocably pulled out of the bankruptcy estate and subsequently passed to any person or entity with a possessory interest in it. This is usually the bankrupt debtor who will be revested with the property's title. Title is regarded as belonging to the bankrupt just as if he had never been in bankruptcy, and stands as it did before filing.

If the Chapter 7 proceeding is for an individual debtor, such liability for the environmental cleanup can be discharged. If the debtor is a

46. In re Furco, Inc. 76 B.R. 523, 532 (Bankr. W.D. Pa. 1987); see also 2 COWANS § 9.9 at 80.
47. In re Motley, 10 B.R. 141, 145 (M.D. Ga. 1981). As one commentator mentions in passing, it appears that other bankruptcy courts are unwilling to say that actual title is transferred or even affected by the process of abandonment. For these courts, abandonment is not regarded as the "divesting and revesting of title to property." See Leonard J. Long, Burdensome Property, Onerous Laws, and Abandonment: Revisiting Midlantic National Bank v. New Jersey Department of Environmental Protection, 21 Hofstra L. Rev. 65, 91-92 n.83 (1992). Instead, "it is now viewed as a divesting and revesting of control over the property." Id., see also In re R-B-Co., Inc. of Bossier, 59 B.R. 43, 45 (Bankr. W.D. La. 1986) ("The Court does not believe that abandonment can be used, as a means of effecting a transfer of title. Under section 554, upon abandonment, the trustee or debtor-in-possession is simply divested of control of the property because it is no longer property of the estate.") (quoted in Long). The trustee, according to these dissenting courts, holds a "constructive" interest, rather a "real" interest in the property of the estate. Long, supra at 91-92 n.83; see also Jim Walter Holmes, Inc. v. Sallows (In re Sallows), 869 F.2d 1434, 1437 n.2 (11th Cir. 1989) ("Upon abandonment, the interest held constructively by the Chapter 7 trustee reverted to the [debtor].") (quoted in Long). Despite their differences, the act of trustee abandonment is still considered by both sides to be a legitimate practice. Long, supra at 91-92 n.83.
49. 11 U.S.C. § 727 (1993). The effect of a discharge is that "creditors are prohibited from attempting to collect debts that were included in the discharge." Linda Johansson, United States v. Whizco, Inc.: A Further Refinement of the Conflict Between Bankruptcy Discharge and Environmental Cleanup Obligations, 20 Envtl. L. 207, 211 (1990). Discharge technically occurs "[a]fter the estate is liquidated and all available funds are disbursed." Id. There are nine statutory exceptions to discharge mandated in the Code. See 11 U.S.C. § 523 (1993); 11 U.S.C. § 524(f) (1993) (A voluntary reaffirmation by the debtor provides another way in which creditors can collect). Of these, "two have relevance for environmental claims." Mirsky et al., supra note 9, at 657. "[W]illful and malicious injury by the debtor to another entity or to the property of another entity" is the first relevant exception. 11 U.S.C. § 523(a)(6) (1993); see, e.g., In re Berry, 84 B.R. 717, 721 (Bankr. W.D. Wash. 1987) ("Debtor's abandonment of highly dangerous chemicals in open and leaking vats and his failure to maintain proper containment of chemicals constituted willful and malicious conduct for nondischargeability purposes."); see also In re Tinkham, 59 B.R. 209, 217 (Bankr. D.N.H. 1986) (debtor must be aware of the certainty of harm to trigger exception). The second pertinent exception is Section 523(a)(7) which excepts a debt from discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. " 11 U.S.C. § 523(a)(7) (1993); see, e.g., Kelly v. Robinson, 479 U.S. 36, 52 (1986) (restitution order, necessary for the obtainment of probation in a welfare fraud case, is nondischargeable under the fines or penalties provision); see also In re Wright, 87 B.R. 1011, 1013-16 (Bankr. D.S.D. 1988) (section 523(a)(7) ap-
corporation that is liquidating, discharge is not permitted, but the only thing left in the end is a worthless corporate carcass. It has been asserted that secured creditors should then be held accountable. The lack of precedential support for this argument does not bode well for the EPA and its state allies. It is more likely that a government agency will have to look to itself and ultimately the taxpayers for the funds.

50. See 11 U.S.C. § 727(a)(1) (1993) (“The court shall grant the debtor a discharge, unless the debtor is not an individual.”).

51. Long, supra note 46, at 106-07. Long adds that:

[u]sually after a Chapter 7 liquidation is completed, the corporate debtor simply ceases to exist (i.e., all the stock of the corporate debtor is canceled), or the corporate debtor continues to legally exist but with no assets. And ceasing to exist or having no assets, as a legal or practical matter the corporate debtor cannot be held to account for the cost of an environmental cleanup. A non-entity cannot be held liable for the cost of an environmental cleanup; and getting shareholders in a corporation with no assets (but facing the prospects of an environmental cleanup) to contribute new capital to the debtor is not a very realistic option.

52. See Van Patten & Puetz, supra note 11, at 248 n.206 (“Although what happens after there has been an abandonment by the trustee is not always clear, it is likely that the property in this case would go to the secured creditors.”). Cosetti & Friedman posit the argument that Section 506(c) can provide the basis for secured creditor liability. Supra note 2, at 95. This provision says: “[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.” 11 U.S.C. § 506(c) (1993). The EPA has adopted this position. Cosetti & Friedman, supra note 2, at 96. One authority adeptly summarizes the problem with targeting secured creditors in any bankruptcy situation:

Creditors of a bankrupt may be divided into two broad classes, secured creditors and unsecured creditors. The former are distinguishable from the latter because they, in addition to having a contractual right to repayment, also have a recognizable property interest in the collateral. That property interest, be it in personal or real property, is afforded protection under the Fifth Amendment.


53. Cosetti & Friedman recognize that “the concept of ‘benefit’ to the secured creditor [a necessary condition to avail oneself of Section 506(c) of the Code] is narrowly interpreted.” Cosetti & Friedman supra note 2 at 96. The requirements for a successful showing of “benefit” are stringent. First, “the trustee must demonstrate in quantifiable terms that funds were expended which directly protected and preserved the collateral.” Id. (citing In re Sonoma V, 24 B.R. 600, 603 (Bankr. 9th Cir. 1982). Also, the “claimant has the burden of showing that but for the costs expended, the property would yield less to the creditor.” Id. (citing Brookfield Prod. Credit Ass’n v. Borron, 738 F.2d 951, 952-53 (8th Cir. 1984)). Besides these obstacles to the agencies, one court actually authorized the secured creditor to disavow possession of the portion of the collateral that was worthless and an environmental liability. Id. (citing In re T.P Long Chem., Inc., 45 B.R. 278, 288 (Bankr. N.D. Ohio 1985)).
With the relevant parties now depicted, and the issues brought to the forefront, the stage is set to describe a case that presented the Supreme Court with the classic problems inherent in an abandonment of polluted property by a Chapter 7 trustee: *Midlantic National Bank v. New Jersey Department of Environmental Protection*.

III. THE DEBACLE OF MIDLANTEL

A. The Facts

Quanta Resources Corporation (Quanta) stored and processed waste oil at several locations.\(^{54}\) The New Jersey Department of Environmental Protection (NJDEP) discovered in June 1981 that Quanta had violated a provision of the operating permit for its Edgewater, New Jersey facility by accepting more than 400,000 gallons of oil containing polychlorinated biphenyls (PCBs), highly toxic carcinogens.\(^{55}\) This dangerous mixture was stored in deteriorating vats, and therefore, leakage into the Hudson River and resultant contamination was a serious threat.\(^{56}\) In addition, a mere 500 yards from the site was a budding, middle-class residential neighborhood known as the New Jersey Palisades.\(^{57}\) Any fire on the Quanta premises could lead to the release of poisonous fumes, subjecting thousands of people to grave danger.

Quanta was simultaneously accepting more than 70,000 gallons of PCB-laden waste oil at its Long Island City facility, storing it in rottng, leaking containers.\(^{58}\) It is important to note that like the New Jersey property, the New York land was subject to liens far exceeding its present value.\(^{59}\)

Negotiations between Quanta and the NJDEP had begun for the cleanup of the New Jersey site when Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in October 1981.\(^{60}\) The NJDEP then issued an order requiring cleanup, and Quanta responded by converting the action to a liquidation proceeding under Chapter 7.\(^{61}\)

Unable to sell the Long Island City site, undoubtedly because of its environmental liabilities, the Chapter 7 trustee notified the creditors and the Bankruptcy Court that he intended to abandon the New York property under Section 554 of the Bankruptcy Code.\(^{6}^{0}\) There was no denial that the circumstances fit perfectly into the statute’s explicit

\(^{54}\) *Midlantic*, 474 U.S. at 496-97.

\(^{55}\) *Id.* at 497.

\(^{56}\) Cosetti & Friedman, *supra* note 2, at 69.

\(^{57}\) *Id.*

\(^{58}\) *Midlantic*, 474 U.S. at 497.

\(^{59}\) Cosetti & Friedman, *supra* note 2, at 69-70.

\(^{60}\) *Midlantic*, 474 U.S. at 497

\(^{61}\) *Id.*

\(^{62}\) *Id.*
requirements for abandonment, given the fact that the encumbrances and anticipated cleanup costs vastly exceeded the property's value subsequent to cleanup. The City and State of New York vehemently objected. First, they argued that the trustee had the obligation to comply with existing laws and orders by using all assets of the estate to remove the hazardous wastes from the facility. The government entities were also aware that the trustee intended to carry out a post-abandonment removal of the 24-hour guard service and shut off the fire suppression system, leaving the public vulnerable to vandals and fire. Thus, New York's second argument was that abandonment would contravene public health and safety.

The Bankruptcy Court, which approved the abandonment, rejected both of these arguments. The court emphasized that the state and federal environmental authorities were better suited to protect the public health than the trustee or the creditors. With the signature of the judge fresh on the abandonment order, New York cleaned up the site at a price of $2.5 million. The District Court followed by affirming the Bankruptcy Court and an appeal was made to the Third Circuit Court of Appeals.

At the Edgewater site, the trustee was preparing for another abandonment. He had ignored the leaking tanks and sold off all the anti-spill equipment. His subsequent abandonment petition was approved by the Bankruptcy Court in May of 1983 over the NJDEP's heated objection. Soon thereafter, the NJDEP joined New York with a direct appeal to the Third Circuit Court of Appeals.

The Third Circuit reversed the Bankruptcy Court in separate judgments, holding that both decisions to permit abandonment were in
The Supreme Court granted certiorari "to determine whether the Court of Appeals properly construed section 554."\(^7\)

**B. The Holding**

In a 5-4 decision, the Supreme Court affirmed the Third Circuit's denial of abandonment.\(^7\) For the majority, the issue was straightforward: "whether section 554(a) of the Bankruptcy Code ... authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety."\(^7\) The answer, although neither resounding nor decisive, was "no."

Justice Powell argued that before the enactment of the Code in 1978, the trustee's abandonment power was restricted by a "judicially developed doctrine" created to protect particular state and federal interests.\(^7\) Comprising the centerpiece of this doctrine were three "pre-Code" cases: *In re Ottenheimer*,\(^7\) *In re Chicago Rapid Transit Co.*,\(^7\) and *In re Lewis Jones, Inc.*\(^7\) According to Justice Powell, these three authorities, each prohibiting abandonment by a trustee if it would result in a violation of a certain state or federal law, were implicitly incorporated into what is now section 554(a) of the Code.\(^7\)

Of course, there was the "minor" problem that the statute didn't explicitly provide for this limitation on a trustee's discretion, but that didn't stop the majority. They proffered a "normal rule" of statutory construction: "[i]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."\(^7\) The logical outgrowth of such an assumption, in the eyes of the Court, was that if Congress had truly desired to grant the trustee an exemption from the common-law abandonment restriction, it would have said so expressly in the statute.\(^7\)

The majority next tried their hand at reconciling section 554 with section 362, the automatic stay provision. Section 362 contains a

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74. Id. at 499-500 (describing the reasoning of the two *Quanta* cases).
75. Id. at 500 (citation omitted).
76. Id. at 507.
77. Id. at 496 (citation and footnote omitted).
78. Id. at 500.
79. 198 F.2d 289 (4th Cir. 1952) (refusing to grant trustee permission to abandon barges in violation of a federal navigation statute).
80. 129 F.2d 1 (7th Cir.), cert. denied, 317 U.S. 683 (1942) (trustee's attempted abandonment of the operation of a branch railway line is invalidated as being in contravention of a controlling state statute).
83. Id. (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)).
84. Id.
number of exceptions, such as the police power exceptions found in sections 362(b)(4) and (b)(5). Some authorities argue that if Congress wanted to solidify a police power exception to abandonment, it would have done so in the same manner as it did with section 362: by putting it in the words of the statute. Justice Powell rejected this reasoning and argued that a comparison of the two provisions would be misguided. The exceptions to section 362, said Powell, were developed because courts were unduly expanding the scope of the stay beyond its anticipated and intended bounds. Section 554 did not need any congressional “help” because abandonment had already been subject to judicial limitations and therefore, explicit restrictions would have been superfluous.

Pulling the Court out of the friendly confines of Title 11, Powell articulated a justification based on the “intent” of 28 U.S.C. § 959(b). In essence, the statute provides that a trustee must “operate and manage the property in his possession . . . according to the requirements of the valid laws of the State in which the property is situated.” It was admitted by the Court that the statute did not apply in the abandonment context and didn’t even apply to a liquidation proceeding.

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85. The automatic stay language of the exceptions is stated below:

(a) Except as provided in subsection (b) of the section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action and proceeding against the debtor that was or could have commenced before commencement of this case under this title, or to recover a claim against the debtor that arose before commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay.

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police power or regulatory power;
(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power.

11 U.S.C. § 362(a)(1)-(2), (b)(4)-(5) (1992) (emphasis added). For a little clarification, “police power” is simply “the power of states to regulate the conduct of their citizens.” Sward, supra note 24, at 414. According to Sward, few would argue that a “core of legislation designed to protect the public health and safety” is beyond the scope of the power. Id. at 415.

86. Midlantic, 474 U.S. at 504.
87. Id.
88. Id.
90. Midlantic, 474 U.S. at 505. One article has compiled an impressive list of cases showing that “[c]ourts have split as to whether 28 U.S.C.A. Section 959(b) applies to a debtor or to a trustee that is liquidating, as opposed to operating, the debtor’s busi-
However, the existence of such a provision indicated that Congress "did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers." 91

Remaining outside the sphere of the Code per se, the Court argued that the existence of federal environmental legislation such as CERCLA reflected Congress' overriding "goal of protecting the environment against toxic pollution." 92 In light of Congress' deep concern for the environment and the threats posed by hazardous waste disposal, the majority found it hard to believe that legislators destroyed the "longstanding" restrictions on abandonment by enacting section 554(a). 93

The Court concluded the opinion with an admonition that "Congress did not intend for section 554(a) to pre-empt all state and local laws" and its terse holding: "a trustee [in bankruptcy] may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." 94 An affirmative obligation was even placed on the shoulders of bankruptcy courts: "[a] Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." 95

Problematically, there was a now-famous footnote:

[i]n addition to the abandonment power vested in the trustee by section 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm. 96

Coming from a court that gives little attention to this esoteric area of law, this last qualification is an exception to an exception that "renders both the ratio decidendi and the import of the Court's opinion quite unclear." 97

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91. Midlantic, 474 U.S. at 505.
93. Id. at 506-07
94. Id. at 507.
95. Id.
96. Id. at 507 n.9.
97. Id. at 507.
C. The Faulty Rationale

Regardless of whether the result is correct, there is no doubt that the majority's reasoning is fraught with inconsistencies and faulty legal analysis. We are presented with a statute that expressly allows a trustee to abandon if, after a cost-benefit calculation, it is determined that the property is burdensome to the estate. There are no exceptions to the trustee's authority outlined in the language of the statute. Some, such as Justice Scalia, believe that the language of any statute is the sole manifestation of its true meaning. For Scalia then, analysis of the abandonment provision of the Code ends at this point. It is difficult, even for skeptics of strict constructionism, to ignore the unqualified language of section 544(a) unless other persuasive contradictory authority exists. Of the possible alternatives or supplements that one can rely on in pursuit of statutory meaning, none has garnered more support or legitimacy than legislative history. For argument's

98. See Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 CARDOZO L. REV. 1597, 1598 (1991). Zeppos summarizes Scalia's statutory approach as follows: [a] part of this "new textualism" Justice Scalia has urged an abandonment of the Court's traditional use of legislative history to interpret statutes. In place of this historical and intentionalist approach, Justice Scalia has argued that, generally speaking, the only legitimate source for interpretative guidance in statutory cases is the text of the statute at issue, or related provisions of enacted law which shed light on the meaning of the disputed text. Id., see also Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring); see generally William N. Eskridge, Jr., The New Textualism, 57 U.C.L.A. L. REV. 621 (1990). This methodology has been traditionally characterized as the "plain meaning rule." Adam J. Wiensch, Note, The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law, 79 GEO. L.J. 1831, 1834 (1991) ("The plain meaning rule requires that 'the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain the sole function of the courts is to enforce it according to its terms'.") (quoting Cammetti v. United States, 242 U.S. 470, 485 (1917)). Judge Easterbrook of the Seventh Circuit Court of Appeals is another prominent member of the "textualist" school. See Frank Easterbrook, Statutes' Domains, 50 U. CHI. L. REV 533, 548-49 (1983) (supporting strict construction to prevent legislatures from legislating after they are "dead").

99. One commentator perceptively adds that Scalia and the proponents of the plain meaning rule do not totally ignore legislative history. They will stray in selected cases because the [plain meaning] rule is applied only when the result is not "at odds" with the intention of the drafters, the Court would be remiss if it failed to look to the legislative history to check the result of their application of the rule against the legislative history's indication of congressional intent. Wiensch, supra note 98, at 1837. In other words, statutory construction will not begin and end with the text if the rule would create "an absurd result." Id. at 1837 n.38.

100. Patricia Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 306-08 (1990) (legislative history, manifested in the committee reports, represents the will of Congress); Kenneth N. Klee and Frank A. Merola, Ignoring Congressional Intent: Eight Years of Judicial Legislation, 62 AM. BANKR. L.J. 1, 3 (1988) ("[R]esort to legislative history is the best method by which a court can peer into the drafters' minds."). Of course, "it is important to understand that certain documents are more conclusive of legislative intent than others." Id. at 4. Klee and Merola as-
sake, we should adopt the most liberal view, such as that of Justice Frankfurter: "[i]f the purpose of construction is the ascertaining of meaning, nothing that is logically relevant should be excluded."101

As mentioned earlier, many believe that the legislative history of section 554 is not helpful in determining the permissible parameters of a trustee's authority to abandon environmentally-impaired estate property.102 The Court assumes as much in Midlantic. One commentator put forth an interesting explanation for congressional silence on the issue. The starting point of "environmental consciousness," he stated, was the Love Canal incident in mid-1978.103 By studying periodical indices, he determined that pollution emanating unabated from waste facilities was not recognized as a major problem until the mid-to-late 1980's.104 Given these circumstances, "it is thus a fair question whether Congress ever contemplated use of section 554(a) by a bankruptcy trustee in Midlantic's unusual circumstances, a situation which evidently had not been presented before passage of the 1978 Act."105

It can be argued, however, that Congress was aware of how the Code would interact with environmental enforcement. For example, in the legislative history of the (b)(4) exception to the automatic stay, Congress states that:

> [i]f, where a governmental unit is sued a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.106

This language supports the premise that Congress did consider environmental impact when they enacted the Code. In the case of the automatic stay, Congress made a calculated decision that the environmental interests of the state and federal government would subsume bankruptcy ends. Apparently, Congress utilized the same variables when constructing section 554, but came away with the opposite conclusion. A plausible scenario is that because it was obvious to Congress to hold bankruptcy policy in the abandonment context

asserted that for bankruptcy, "the joint statements are more authoritative than the committee reports."105

104. O'Shaughnessy, supra note 64, at 868 n.102.
105. Id.
paramount to any other concerns, including environmental safety, it found prolonged debate to be an unnecessary waste of time. Thus, a paucity of legislative history did not reflect a lack of contemplation, but rather a lack of need for any contemplation.

As legislative history joins the text in supporting a pro-abandonment, anti-Midlantic stance, it becomes prudent to move a level down in the interpretive hierarchy to the common law. The view of the Midlantic Court is that three pre-Code cases are dispositive proof that a legal consensus existed supporting the restriction of a trustee's abandonment power. However, as Justice Rehnquist implies in his pejorative dissent, three disparate cases concurring on a general legal principle sounds more like a coincidence than a production of law etched in stone. Also, Justice Rehnquist is again persuasive when he castigates the majority for selecting cases that are factually distinguishable from everything in representing this well-settled exception. Justice Powell's argument in this vein is tenuous at best.

In yet another line of analysis, it is possible to utilize what one commentator calls the "knew how to" rule. This rule is based on the presumption that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." Throughout the Bankruptcy Code, there is a plethora of exceptions to the general rules. To name a few, there are the discharge exceptions outlined in section 523(a), the avoidance exceptions delineated in section 547(c), and the exceptions to the automatic stay set out in section 362(b).

In fact, as Justice Rehnquist intimates, section 554 is one of the few mandates in the Code without an exception. Clearly, Congress "knew how to draft an exception covering the 'exercise' of certain police powers when it wanted to" as well as "how to draft a qualified abandonment provision." To those that place great weight on the

108. Id., see also Wiensch, supra note 98, at 1842 n.81 ("The Court's claim that there were 'well-recognized restrictions on a trustee's abandonment power' is not entirely compelling.").
109. Id. at 1839.
110. Id. at 1839.
115. Id.
116. Id. (citing 11 U.S.C. § 1170(a)(2) (1993), permitting the abandonment of railroad lines only if "consistent with the public interest."); see also Silber, supra note 2, at 881 n.89 ("Congress could have drafted a qualified abandonment provision had it so intended.").
rule's significance, all of this would indicate a meaningful pattern. When Congress wants to create exceptions to express language in the Bankruptcy Code, it sets it out in the Code itself. Contrary to Justice Powell's belief, it is not Congress' practice in the Code to leave out an exception because it assumes all will know about its reliance on an arcane, judicially created one. Section 554 has no exceptions because Congress wanted it that way.

The Court was fully aware that its soft response to the persuasive "knew how to" argument would not be sufficient. To bolster its already weak foundation, the majority devoted the last portion of its opinion to a peculiar canon of statutory construction that might be called "spirit bootstrapping." As explained above, Powell argues that 28 U.S.C. § 959(b), coupled with the existence of federal environmental laws, reflects Congress' desire not to disregard governmental interests in the formulation of a bankruptcy process. The "spirit" of these provisions, he implies, should be bootstrapped onto all congressional acts, including the Bankruptcy Code and its abandonment provision. This is wishful thinking on Powell's part. When interpreting the intent behind a piece of legislation, the statute must be handled individually and in its own vacuum. This is because Congress always has a different goal in mind when it passes a specific law. Sometimes public safety is advanced, or at times fairness may be the desired end. Other laws may be designed simply to further the lot of particular interest groups. To say that one law's apparent intent reflects an across-the-board congressional intent, or that some statutes (i.e., CERCLA, RCRA) are inherent auxiliaries of another (i.e., the Bankruptcy Code) is a distortion of how our legislative process works. Nevertheless, another somewhat desperate attempt by the Midlantic majority to rationalize its holding falls by the wayside.

Whether or not one looks at the text of the statute, its legislative history, common law precedent, or even its relationship to other provisions in the Code, it is clear that the majority's reasoning is flawed on all fronts. Abandonment conditioned only by the "burdensome" or "inconsequential benefit" test expressly provided for in section 554(a) should be the unequivocal rule. The primary reason why it is not is because once again, the Supreme Court has used its all-powerful discretion to legislate public policy from the bench. Clearly, the

Interstate Commerce Commission in the industry, the railroad provisions are unique." Id.

117 Midlantic, 474 U.S. at 505-06.

118. Adam Wiensch argues persuasively that whatever the rationale was behind the Midlantic decision, it wasn't a desire to be faithful to the text. In his note, he states that "[t]he [Supreme] Court has been remarkably consistent in deciding Bankruptcy Code cases in that, almost without exception, it has used a textualist approach for statutory interpretation." Wiensch, supra note 97, at 1832. There have been two significant departures from the practice: Midlantic and Kelly v. Robinson. Id. at 1832-33. In each, says Wiensch, the Court was presented with a fact pattern that necessi-
Court was appalled at the egregious conduct of Quanta's bankruptcy trustee and the devil-may-care attitude of the bankruptcy court that approved the abandonments. The wording of one footnote reflects this disbelief and dismay:

[the trustee was not required to take even relatively minor steps to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents. Moreover, the trustee's abandonment at both sites aggravated already existing dangers by halting security measures that prevented public entry, vandalism, and fire... The 470,000 gallons of highly toxic and carcinogenic waste oil in unguarded, deteriorating containers "present risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact." 119

Apparently, the Court believed that allowing abandonment in this situation would undoubtedly send the wrong message to polluters that bankruptcy and abandonment was the answer to all their legal and fiscal troubles. Creating an implicit exception, even if not grounded in law, was something that the majority had to do to prevent many a sleepless night.

Perhaps symbolism and deterrence were not the only public policy components in the formula. The Court might have injected their belief that New York and New Jersey in *Midlantic* were "involuntary creditors" who were acting not only for themselves but for the citizens in a *de facto* class action suit against Quanta. 120 The involuntary creditor should get a priority over other creditors, by having the trustee comply with the environmental laws using estate funds. This is sound policy because unlike other unsecured creditors, the involuntary creditors had risk unwillingly thrust upon them. 121

On the other hand, each justice in the majority could have individually decided that the creditors, rather than the public, should have to pay for the cleanup because they are better able to quantify and distribute the risk. 122 It is also possible that the Court was silently applying a balancing of the equities approach contemplated in *NLRB v. Bildisco & Bildisco*, 123 whereby public health would be balanced...
against the economic interests of the debtor and its creditors.\textsuperscript{124} Whatever public policy factor came into play to produce the ultimate holding, it will not change the fact that Congress should make the laws and judges should interpret them. As Judge Cornelia Kennedy of the Sixth Circuit has stated: “policy decisions are the responsibility of Congress, which could easily modify the Bankruptcy Code. . .”\textsuperscript{125} \textit{Midlantic} and its policy-driven reasoning is wrong.

IV. Judicial “Sleight of Hand”\textsuperscript{126} After \textit{Midlantic}

Before 1986, courts often encountered the \textit{Midlantic} problem. A typical scenario would evolve as follows: a company would commit environmental violations by failing to clean up hazardous wastes on its property, and subsequently be charged with an order by an environmental agency to clean up the waste. Instead of complying with the order, the company would opt for a Chapter 7 liquidation and the trustee, after reviewing the case, requests abandonment. In many instances, courts allowed abandonment if the statutory requirements were met. However, the \textit{Midlantic} decision provided the courts with a new interpretation. This approach was difficult to reconcile with the plain meaning of section 554 of the Code, and many judicial commentators believed that the \textit{Midlantic} exception was an unjustified product of emotion and public policy considerations. How would federal judges be able to reconcile these concerns?

The answer is quite simple. Courts, after realizing the contradictions created by \textit{Midlantic}, used illusion and sleight of hand to minimize potential damage without vitiating the principal of \textit{stare decisis}. In doing so however, they have transformed a legitimate legal elephant, \textit{Midlantic}, into an inconsequential mouse.

A comparison of the fact patterns of cases involving a trustee’s attempted abandonment of hazardous waste reveals three common threads. First, in each there has been an initial determination that the polluted property was “burdensome” or of “inconsequential value and benefit to the estate” and therefore had satisfied the facial requirements of section 554(a).\textsuperscript{127} Second, there has been some finding that the property is in violation of environmental regulations or statutes, or abandonment of the property would run contrary to these prohib-


\textsuperscript{125} United States v. Whizco, 841 F.2d 147, 151 n.5 (6th Cir. 1988).

\textsuperscript{126} O'Shaughnessy, supra note 64, at 867.

\textsuperscript{127} See, e.g., \textit{In re Oklahoma Ref. Co.}, 63 B.R. 562 (Bankr. W.D. Okla. 1986) (“From the evidence it is plain that the property is burdensome and of inconsequential or no value to the estate.”).
Third, and most significantly, none of the cases have come close to duplicating the overwhelming threat to public health and safety that was found in *Midlantic*. There have been a few anomalies, such as the case where five tons of extremely hazardous material was buried while in an uncontrolled condition or where deadly cyanide gas was escaping into the atmosphere. But for the most part, the post-*Midlantic* cases addressed situations involving abandoned plants that had at one time or another generated toxic substances as a necessary part of production, such as oil refineries, a fertilizer plant, and for some reason, a number of electroplating production facilities, but no environmental time-bomb. The fact that most of the courts addressing the abandonment issue are starting at the same factual baseline is important. It shows that the differing results that have come out of *Midlantic* are not as much a reflection of the peculiar facts of each particular case as they are a by-product of judges' different perceptions of what the abandonment standard articulated by *Midlantic* really was.

### A. Taking a Step Back: What Did Midlantic Really Say?

To say that Justice Powell's *Midlantic* opinion was incomprehensible would be unfair. Powell left no doubt that if the act of abandonment would prospectively violate (or the property itself is already in violation of) environmental orders and laws, *Midlantic*'s mandate kicks

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128. See, e.g., *In re Shore Co.*, 134 B.R. 572, 578 (Bankr. E.D. Tex. 1991) ("This Court is convinced that in all likelihood the property is in violation of the laws of the State of Texas as well as relevant federal environmental laws."); *In re Better-Brite Plating, Inc.*, 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989) [hereinafter *Better-Brite I*] (the Wisconsin law mandating cleanup of a waste site would also be violated by the trustee's proposed abandonment); *In re Stevens*, 68 B.R. 774, 782 (D. Me. 1987) (if trustee abandoned, the act would constitute a violation of "Maine law regulating the disposal of hazardous waste."); *see also In re FCX, Inc.*, 96 B.R. 45, 54-55 (Bankr. E.D.N.C. 1989) (the *Midlantic* abandonment exception is triggered "whether there have been violations of CERCLA or state environmental law."); *In re Peerless Plating Co.*, 70 B.R. 943, 946 n.4 (Bankr. W.D. Mich. 1987) ("*Midlantic* involved state laws while the law in question here, CERCLA, is federal. However, that is not a significant distinction.").

129. See, e.g., State of New Jersey Department of Environmental Protection v. North American Products Acquisition Corp., 137 B.R. 8, 12 (D.N.J. 1992) ("Unlike in *Midlantic*, there is currently no security service at the premises, nor is there an alarm system."); *In re Anthony Ferrante & Sons, Inc.*, 119 B.R. 45, 49 (D.N.J. 1990) ("This case, on the other hand, is not at all like *Midlantic*."); *In re Franklin Signal Corp.*, 65 B.R. 268, 274 n.9 (Bankr. D. Minn. 1986) ("It is important to compare the facts of this case to those in *Midlantic*."); *Oklahoma Ref.*, 63 B.R. at 563 ([A] factual comparison of the two cases [this and *Midlantic*] is necessary.").


134. See, e.g., *Better-Brite I*, 105 B.R. at 912; *Peerless Plating*, 70 B.R. at 943.
At that point, a three-prong test should be applied, with the satisfaction of each prong a necessary prerequisite for an authorized abandonment. It is not so much a test that places burdens of proof on parties as it is a set of factors that the court will objectively evaluate in making its decision.

First and foremost, the court must make a threshold determination. *Midlantic* dictates that satisfaction of the cost-benefit test will never be the only consideration when there is an accompanying violation of environmental orders and laws, and that the trustee in these cases must take some initial precautionary steps to prevent the aggrandizement of any possible danger to the public. Such a view seems to be bolstered by the fact that Justice Rehnquist, although disparaging Powell’s modification of the previously unqualified standard for abandonment, expressly advocates such measures: “in almost all cases, requiring the trustee to notify the relevant authorities before abandoning will give those authorities adequate opportunity to step in and provide needed security.” This particular action on the trustee’s part is necessary to satisfy this “bare minimum” prong, but is probably not sufficient.

The second component is an amalgam of various requirements set forth by the majority, and should be called the “statutory non-oppresiveness” prong. When Powell and the Court state that “a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health and safety from identified hazards.” 474 U.S. at 507. This author believes that a common sense reading of the language will lead to the conclusion that if either of two conditions are present, application of the *Midlantic* exception is warranted. First, and most obvious, *Midlantic* covers those situations when the actual act of abandoning property saddled with hazardous waste would run counter to state or federal environmental laws or regulations. For example, there may be a state statute that says:

[a] person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

Wis. Stat. § 144.76(3) (1985). While property generating hazardous waste may not in and of itself be in violation of any law, clearly here abandonment of the impacted property without cleaning it up would be a violation. Second, if the trustee wishes to abandon property that happens to be in a condition violative of environmental dictates, but the act of abandonment does not violate any regulations, *Midlantic* is still controlling. Let us say that there is a statute mandating that there should not be more than 20 tons of solid or liquid waste on a piece of property at any one time. Property on which 30 tons of this material is stored is in violation of the law, but abandonment of this property in violation of the law is not necessarily barred.

135. The relevant *Midlantic* phraseology has already been mentioned: “[a] trustee [in bankruptcy] may not abandon property in contravention of a state statute . . . that is reasonably designed to protect the public health or safety from identified hazards.” 474 U.S. at 507. This author believes that a common sense reading of the language will lead to the conclusion that if either of two conditions are present, application of the *Midlantic* exception is warranted. First, and most obvious, *Midlantic* covers those situations when the actual act of abandoning property saddled with hazardous waste would run counter to state or federal environmental laws or regulations. For example, there may be a state statute that says:

[a] person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

Wis. Stat. § 144.76(3) (1985). While property generating hazardous waste may not in and of itself be in violation of any law, clearly here abandonment of the impacted property without cleaning it up would be a violation. Second, if the trustee wishes to abandon property that happens to be in a condition violative of environmental dictates, but the act of abandonment does not violate any regulations, *Midlantic* is still controlling. Let us say that there is a statute mandating that there should not be more than 20 tons of solid or liquid waste on a piece of property at any one time. Property on which 30 tons of this material is stored is in violation of the law, but abandonment of this property in violation of the law is not necessarily barred.


137 See, e.g., *Oklahoma Ref.*, 63 B.R. at 564 (trustee drained tanks filled with sludge, maintained fencing around the area where the waste was stored, and commissioned an environmental status report); *Franklin Signal*, 65 B.R. at 273.
identified hazards,"138 that "abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm,"139 and that "without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself,"140 they are clearly directing their attack upon the nature of the environmental laws, not the nature of harm that will trigger abandonment.141 This is a very important distinction. These general requirements of reasonableness for a police power statute represent such a low threshold that almost every state, local, and federal statute will pass muster. It is likely that in the broad sense, the Court wanted to balance Federalism and Supremacy Clause concerns, but whatever the reason, trustees desiring to abandon property must ultimately look to the third prong for support.

The last prong is the "infringement" prong. As mentioned earlier, the exception to the abandonment power "does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment."142 This restriction on what is otherwise a complete denial of an abandonment request in cases where environmental laws are being violated is, again, a mere nuisance rather than an oppressive obstacle to government agencies. The language forbids the enforcement of future infractions, not future harm, and it so happens that most of the hazardous waste offenses will at the time the state challenges abandonment be at the point where laws have been "officially" infringed.

Overall, the Midlantic exception is even more restrictive of a trustee's discretion than one might gather from a cursory glance of the opinion. It is true that there is an additional qualification in the opinion that is quite amenable to the trustee: that the exception is "narrow."143 However, "narrow" does not mean the same thing as "non-

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139. Id. at 507 n.9 (emphasis added).
140. Id. at 507 (emphasis added). There has been some debate over the meaning of the term "onerous" in this context. The *Peerless* court stated that "such a law might be one that prohibited abandonment or the closing of a case even after an estate was exhausted or one which permitted environmental authorities to completely usurp administration of the case." 70 B.R. at 947 n.3 (citation omitted). According to *Peerless*, a law which would cause depletion of the estate if complied with would not be "onerous." *Id.* at 947. Leonard Long has an even more expansive view. He argues that the trustee should not be allowed to abandon property burdensome to the estate under circumstances where the burden would shift to the debtor upon the debtor's being revested with the property. Burdensome property of the estate which, as a result of being abandoned by the trustee, becomes burdensome to the debtor is, in a very real sense, "onerous" to the bankruptcy adjudication.

*Supra* note 47, at 104.
142. *Midlantic*, 474 U.S. at 507 n.9 (emphasis added).
143. *Id.*
existent." The Midlantic Court's continual emphasis on restricting the trustee's abandonment power logically would be more weighty evidence of its ultimate intent than one word mentioned in a conclusory footnote.

B. What do a Majority of the Courts Want Midlantic to Say?

Most of the courts faced with a Chapter 7 abandonment attempt have rejected the above analysis and liberally authorized abandonment. A good way to introduce the approach of these courts is to discuss a case that seems to place all of the relevant issues on the table: In re Franklin Signal Corp.¹⁴⁴

1. The Leader of the Pack

In this influential bankruptcy case, the Chapter 7 trustee made a motion under section 554(a) to abandon fourteen drums of contaminated waste.¹⁴⁵ The bankruptcy court granted the motion and immediately went on the offensive, criticizing those who would give a "literal" reading to the Midlantic holding.¹⁴⁶ For the bankruptcy court, "this strict reading of the Court's decision is [neither desirable nor] what the majority intended to hold."¹⁴⁷ The bankruptcy court appeared to believe that Midlantic was only addressing those rare occasions where the circumstances would be appallingly egregious.

Next, the court's interpretation of the Midlantic exception was put forth: "[a trustee wishing to abandon] only needs to take adequate precautionary measures to ensure that there is no imminent danger to the public as a result of abandonment."¹⁴⁸ The court mentioned two examples. First, the trustee must conduct an investigation to determine the types of hazardous substances in the estate's possession, but only if he reasonably believes that an abandonment will violate environmental laws.¹⁴⁹ Second, the trustee is required to inform state and federal environmental agencies of the status of the property and the desire to abandon it.¹⁵⁰

The Franklin Signal court opined that any evaluation of the abandonment problem should take five specific factors into account: "(1) the imminence of danger to public health and safety, (2) the extent of probable harm, (3) the amount and type of hazardous waste, (4) the cost to bring the property into compliance with environmental laws, and (5) the amount and type of funds available for cleanup."¹⁵¹ Such

¹⁴⁵ Id. at 269.
¹⁴⁶ Id. at 271.
¹⁴⁷ Id.
¹⁴⁸ Id. at 272.
¹⁴⁹ Id. at 273 n.8.
¹⁵⁰ Id. at 273.
¹⁵¹ Id. at 272.
a test, said the court, "will effectively balance the competing interests." The court, in applying the Midlantic balancing test to the facts, admitted that the drums were deteriorating and leakage was a possibility, but refused to consider them a threat to public health, since the state had not yet identified an imminent hazard to the public. But what really tipped the balance in favor of abandonment, emphasized the court, was the fact that there were no unencumbered assets with which the trustee could comply with regulations and that other parties had "an interest in disposing of the waste."

In short, Franklin Signal stands for two propositions. First, it signifies that in some abandonment cases the issue "is not one of public safety but one of money." Unfortunately, the public ultimately foots the bill in these cases when cleanup becomes imminent. Second, this court considered Midlantic a compromise, "requiring something more than mere consideration of state law, but something less than complete compliance."

2. The Rest

The courts in this majority group have touched upon bits and pieces of the Franklin Signal analysis, but none have ever adopted all of it as its own. Unbelievably, only two courts other than Franklin Signal even mention that precautionary steps should be taken by the Chapter 7 trustee before abandonment. However, when they did mention the first prong, they did so only to say that it should not be a

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152. Id.
153. Id. at 273.
154. Id.
155. Id. at 274 ("The State of Wisconsin, the debtor, the landlord, and perhaps the debtor's officers and directors may be responsible for the cleanup.").
156. Id. at 274 n.9.
159. See Doyle Lumber, 137 B.R. at 203; Anthony Ferrante, 119 B.R. at 50.
mandatory requirement. The court in *Doyle Lumber* questioned whether a Chapter 7 trustee has the knowledge to take these remedial actions. 160 In *Anthony Ferrante*, the “bare minimum” factor was described as a rule that can be summarily waived if “abandonment will not render the public health and safety inadequately protected.”161 What these courts ignore is the fact that the *Midlantic* Court demanded that bankruptcy courts formulate “conditions that will adequately protect the public’s health and safety” before allowing an abandonment.162 *Midlantic* was clearly misinterpreted — whether intentionally or not — to justify abandonment.

Of all the factors articulated in *Franklin Signal*, none has been embraced by the majority cases more than “imminence of danger to the public health and safety.”163 The catch phrase coined in *Shore* is typical: “a trustee’s right to abandon environmentally impacted estate property is limited only by the precondition that the trustee remediate any imminent and identifiable danger present on the property proposed to be abandoned.”164

Reliance on this standard in determining whether abandonment by a Chapter 7 trustee should be authorized is wrong. As explained above, *Midlantic* did not mention “imminent” in the same breath as the harm that would accompany an abandonment. “Imminent” harm was an essential qualification of the second prong; a statute must be designed to address “imminent and identifiable harm” before a state

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160. 137 B.R. at 203 (“This court has reservations regarding the ability of a Chapter 7 trustee to perform identification and remediation procedures like those requested by the Commonwealth.”).

161. 119 B.R. at 50 (quoting *Purco*, 76 B.R. at 533).


163. *Franklin Signal*, 65 B.R. at 272. See, e.g., L.F Jennings, 1993 U.S. App. LEXIS 22556, at *9 (“Before abandonment of a property can violate *Midlantic* the property must represent an immediate and identifiable harm to public health or safety.”) (emphasis added); *MCI*, 151 B.R. at 108 (asking “whether the property constitutes an imminent threat to the health and safety of the public”) (emphasis added); *Heldor*, 131 B.R. at 588 (“*Midlantic* created a narrow exception to the abandonment power involving cases in which abandonment would aggravate imminent and identifiable dangers to the public health or safety.”) (emphasis added); *Anthony Ferrante*, 119 B.R. at 49 (abandonment allowed if “the violation caused by abandonment would not create a risk of imminent and identifiable harm.”) (emphasis added); *Purco*, 76 B.R. at 533 (must show that “public health and safety are not adequately protected” or that there is a “clear and imminent danger” or that there exists a “great risk of harm or threat to public safety, either immediate or in the foreseeable future”). It should be acknowledged that the third prong of the *Midlantic* test, “speculative or future violation,” has dissolved into virtual nothingness. 474 U.S. at 507 n.9. The *Anthony Ferrante* court briefly mentioned it, but then proceeded to analyze how “imminence” would be interpreted. 119 B.R. at 49.

164. 134 B.R. at 578 (emphasis added); see also *In re Rancourt*, 144 B.R. 601 n.1 (Bankr. D.N.H. 1992) (“imminent” risk means “actual present identifiable harm,” not the “possibility or threat of a risk to the public health and welfare which may materialize in the future from existing conditions although there is no present threat.”).
or federal agency could use its violation as a green light to halt abandonment of polluted property.\footnote{165}

To complicate the already confused situation, still other courts have thrown another obstacle into the path of government agencies trying to enforce cleanup before abandonment. Besides a showing that there is “imminent and identifiable harm” to the public, states must prove that the “abandonment will not \textit{aggravate} the potential for harm to the public.”\footnote{166} The origin of this “aggravation” phrase is footnote 3 of the \textit{Midlantic} decision, where the Court expressed its dismay at the trustee’s pre-abandonment activity.\footnote{167} Whether or not this descriptive footnote is a holding of the Court, the fact remains that this standard is inherently flawed. It is founded on the premise that only a change in the status quo will warrant a stoppage of abandonment. What happens if the status quo is imminent death and destruction? Are these courts willing to say that as long as the trustee is able to show that the harm will remain at an unchanging “possibly deadly” level that abandonment will be authorized? Even these courts would have difficulty justifying such a decision. Having a “change in the status quo” requirement without having a plan to deal with an already heinous status quo is incomprehensible.\footnote{168}

What constitutes “imminent and identifiable harm” for these courts? For the majority group, a violation of a controlling environmental statute has not constituted the requisite harm.\footnote{169} The problem is that these courts don’t even know themselves what will satisfy this

\footnote{165. One commentator also falls prey to the same misinterpretation as the judiciary. He criticizes the decision in \textit{Oklahoma Refining} for substituting an “immediate and menacing harm” standard for the \textit{Midlantic} “imminent and identifiable” threshold. Salvagni, \textit{supra} note 157, at 517-19. Although making the erroneous assumption that the \textit{Midlantic} Court was talking about “imminent and identifiable” with regard to harm, his belief that the particular words chosen by the Court have dispositive significance is similar to the approach advocated here. The idea that words have meaning in the context of \textit{Midlantic} is something that Perkins finds “weak and unpersuasive.” Perkins, \textit{supra} note 2, at 1578 n.171.}

\footnote{166. \textit{Shore}, 134 B.R. at 579 (emphasis added); \textit{see also North American Prod.}, 137 B.R. at 12 (“If the bankruptcy court finds that abandonment will not \textit{aggravate} the threat of harm to the health and safety of the public or create some additional harm, abandonment should be permitted.”) (emphasis added); \textit{Heldor}, 131 B.R. at 588 (“\textit{Midlantic} created a narrow exception to the abandonment power involving cases in which abandonment would \textit{aggravate} imminent and identifiable dangers to the public health or safety.”) (emphasis added); \textit{Anthony Ferrante}, 119 B.R. at 50 (abandonment must \textit{“aggravate”} any danger to the public”) (emphasis added).}

\footnote{167. \textit{Midlantic}, 474 U.S. at 499 n.3 (“The trustee’s abandonment at both sites \textit{aggravated} already existing dangers by halting security measures that prevented public entry, vandalism and fire.”) (emphasis added).}


\footnote{169. \textit{See, e.g., Shore}, 134 B.R. at 578 (“Violation of state and federal environmental laws is not enough to limit the trustee’s powers of abandonment”). Even a court that applies a more strict, literal reading of \textit{Midlantic is in concurrence. FCX}, 96}}
standard. What they have craftily adopted is a “negative” analysis, pointing out those conditions that will show them when there is not an imminent harm to the public. One of these factors is an environmental agency’s lack of vigorous action and persistence in enforcing the potential violation. If, for example, the EPA knew about the hazardous waste stored on the property of the debtor and for eight years didn’t seek to enforce its administrative order until bankruptcy was filed, this would indicate to these courts that there was no imminent danger and abandonment was warranted. In a worst-case scenario such as this, non-enforcement on the part of agencies is influential. One court, in dealing with an analogous situation, has heartily disagreed:

[The court is also aware that, despite learning of the problem in May of 1986, neither the EPA nor the State of North Carolina commenced any enforcement action until after the notice for abandonment was filed [in December of 1988]. While that may be some evidence that the governments did not consider this site to pose an immediate danger, it certainly does not decide the matter. EPA and state environmental agencies necessarily must proceed deliberately in such matters, but even when there is an inordinate delay, the court must find an immediate danger to public health if in fact one exists.

This court presents the correct approach. In most cases, the fact that the environmental agencies have not actively pursued enforcement or tried to correct the problem themselves often has little to do with threats to public health, and a lot to do with money. The EPA and the state agencies are aware of how bankruptcy works, and know that if they clean up a site and the owner/debtor subsequently files a Chapter 7, it is likely that their costs will be classified as an unsecured

170. See L.F. Jennings, 1993 U.S. App. LEXIS 22656, at *11 (the New Mexico Environment Department [NMED] failed to place the hazardous waste site on its list of contaminated sites, “indicating that the NMED was not considering further testing or investigation of the site . . .”); MCI, 151 B.R. at 108 (“[N]either the EPA nor the DNR, in 1991, opposed the trustee abandoning the site [so] [a] reasonable inference from this is that the agencies did not opine that the property was an imminent threat to the public.”); Shore, 134 B.R. at 578-79 (after being apprised of the environmental violations, “the actions of the TWC vis-a-vis the Debtor have been tepid at best with little in the way of enforcement being effected.”); Anthony Ferrante, 119 B.R. at 50; Purco, 76 B.R. at 533 (“The court infers from the DER’s lack of interest in this proceeding that there is no threat to the public health or safety which warrants DER’s participation.”).

171. See Anthony Ferrante, 119 B.R. at 50.

172. FCX, 96 B.R. at 55 (footnote omitted).

173. See North American Products, 137 B.R. at 12 (“[T]he State was concerned primarily with the public fisc, and not the public welfare.”); Anthony Ferrante, 119 B.R. at 50 (“It certainly seems that DEP was at least as concerned with protecting the public fisc as it was with protecting the public health.”).
claim or even discharged if the debtor is an individual. If they think the debtor may file for bankruptcy, they have the incentive to sit on their hands until after the filing and then pursue cleanup because at least then they will have a good shot at obtaining reimbursement as a first priority administrative expense. This lack of incentive or

174. See Sward, supra note 24, at 434 (“If the state has done the work itself prior to the date of the petition, there is no priority.”); Shanker, supra note 120, at 189 (“If the bankruptcy takes place after the state itself had cleaned up the hazard (as typically it eventually would do), then the state in the later bankruptcy case would hold only an unsecured claim for reimbursement.”).

175. See Kahn, supra note 2, at 2009 (“Where the PRP’s actions, the discovery of the hazard, and the EPA’s response all occur pre-petition, courts agree that the CERCLA liability is a claim in bankruptcy on which the debtor is entitled to a discharge.”) (citing Ohio v. Kovacs, 469 U.S. 274 (1985)); Johannsen, supra note 48, at 212 (“As a pre-petition debt, an environmental cleanup obligation has been characterized as a pecuniary interest that is subject to discharge.”) (citing Kovacs); 11 U.S.C.A. § 101(5) (1993) (definition of “claim” as a “right to payment” or “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment”); 11 U.S.C.A. § 727(b) (1993) (debtor discharged “from all debts that arose before the date of the order for relief” and “any liability on a claim if such claim had arisen before the commencement of the case.”). Kovacs specifically involved the obligation of an individual to clean up property that was in violation of Ohio environmental laws. 469 U.S. at 276. These violations occurred pre-petition. Id. For the Supreme Court, this was the key factor, “[b]ecause since the obligation arises out of Kovacs’ past, Ohio is entitled to use Kovacs’ existing assets to satisfy that obligation and, accordingly, it bears the attributes that make it a “claim” for purposes of bankruptcy [and discharge allowance.”). DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 772 (2d ed. 1990). Baird and Jackson argue that the difficult question of whether a claim arises pre-petition or post-petition should not be the issue in discharge cases. Id. at 773. Instead, they emphasize that “whether Kovacs’ obligation was dischargeable under existing law should have been a narrow question of whether that obligation falls within one of the exceptions in § 523.” Id.


[O]rdinarily, unsecured claims arising from pre-petition activities of the debtor share equally with other unsecured claims unless such claims are granted priority by Code Section 507(a). Claims arising under the environmental laws, however, present a unique set of facts since such claims are often based on both the pre-petition activity of the debtor and the ongoing post-petition contamination and property damage, the costs of the elimination of which could be considered as an administrative expense to preserve the estate. In many cases it is almost impossible to separate the pre-petition damage from the post-petition damage and quantify each. Mirsky et al., supra note 9, at 654. So, it is not surprising that whether an environmental obligation that arises pre-petition, but is corrected post-petition, is an administrative expense or simply an unsecured claim is a difficult question. The Supreme Court had a chance to provide an answer in Midlantic, but decided to sidestep the issue. 474 U.S. at 496 n.2 (the question of whether New York is entitled to reimbursement of its expenses as an administrative expense “is not before us.”). Regardless of your agreement with those who say that the Supreme Court implicitly ruled for administrative expenses in these cases (because forcing the trustee to comply in Midlantic would force him to expend estate assets), the picture is still muddled. See Klee & Merola, supra note 99, at 10 (“The Supreme Court’s decision does little more than legislate a priority imposing the cost of cleanup on the creditors of a bankrupt company rather than on the entire populace of a particular state.”); Perkins, supra note 2,
motivation has been overlooked or purposely sidestepped by a majority of the courts that have rejected _Midlantic_ and allowed abandonment.

at 1585 ("Developing a reliable test based on post-Midlantic decisions is nearly impossible for determining whether cleanup expenses merit administrative priority."). A majority of courts have agreed with the implicit Supreme Court view, reasoning that "since compliance with environmental laws is a prerequisite to abandonment, the costs expended in achieving compliance and in ultimately assuring the public health are a necessary cost of preserving the estate." _Losch, supra_ note 15, at 163 (citing _In re Wal'l Tube & Metal Prod., Inc._, 831 F.2d 118 (6th Cir. 1987); _In re Peerless Plating Co._, 70 B.R. 943 (Bankr. W.D. Mich. 1987); _In re Stevens_, 68 B.R. 774 (Bankr. D. Me. 1987); _In re Pierce Coal and Constr., Inc._, 65 B.R. 521 (N.D. W. Va. 1986); _In re T.P. Long Chem., Inc._, 45 B.R. 278 (N.D. Ohio 1985)); see Mirsky et al., _supra_ note 9, at 654 ("[C]ourts have held that, to the extent the claim represents a claim for reimbursement for money expended post-petition, it should be classified as an administrative expense.") (citing e.g., _In re Microfab Inc._, 105 B.R. 168 (Bankr. D. Mass. 1989); _In re DistriGas Corp._, 66 B.R. 382, 386 (Bankr. D. Mass. 1986); _In re Laurnburg Oil Co._, 49 B.R. 654 (Bankr. M.D.N.C. 1989)). The minority view posits its own rationale that the clean-up orders are pre-petition and unsecured claims because they are "based on pre-petition conduct, compensatory in nature, and without benefit to the estate." _Losch, supra_ note 15, at 162 (citing _In re Dant & Russell_, 853 F.2d 700 (9th Cir. 1988); _So. Ry. v. Johnson Bronze Co._, 788 F.2d 137 (3d Cir. 1985)); see also Mirsky et al., _supra_ note 9, at 654 ("Some courts have held that since these claims arose pre-petition, they should be treated as unsecured claims."). (citing e.g., _In re Stirling Mfg. Co._, No. 88-01190, slip op. at 31 (Bankr. D.N.J. Aug. 22, 1988). An in-depth analysis of the conflict will not be attempted here. However, it can be said that the argument of the court in _FCX_ is persuasive: "[T]he Bankruptcy Code does not provide a priority for environmental damage caused by a debtor's pre-petition acts, and, even when public policy may favor a priority, the court may not create one when one does not exist." _Id._ at 54 n.10 (citing minority cases and _Collier_). The analogy that the _FCX_ court makes to _Kovacs_ is one that is hard to ignore: "[T]he United States Supreme Court has held that a state's pre-petition injunction directing the clean up of a hazardous waste site created no more than a general, unsecured claim not entitled to priority." _Id._ (citing _Kovacs_, 469 U.S. at 282-83). For a fine article taking the majority position, see Joseph P Cistulli, _Note, Striking A Balance Between Competing Policies: The Administrative Claim as an Alternative to Enforce State Clean-Up Orders in Bankruptcy Proceedings_, 16 B.C. ENVTL. AFF. L. REV 581 (1989). In opposition is _Klerman, supra_ note 14.

177 See generally Sward, _supra_ note 24, at 434-37. This Note is concentrating on "present" reimbursement claims that environmental agencies have against the Chapter 7 debtor's estate, e.g., those situations where "the right to payment or an equitable remedy already exists." Mirsky et al., _supra_ note 9, at 650. In Chapter 11 cases, one can also look to the possibility of a debtor discharging "contingent" claims as a motivating factor for delaying tactics on the part of the EPA and its state partners. A "contingent" claim is "the right to payment or an equitable remedy [that] is dependent upon the occurrence of some other event that is reasonably expected to occur." _Id._ As one commentator explains, "CERCLA claims not subject to administrative expense priority are considered general unsecured claims in bankruptcy, and therefore will typically be impaired in a reorganization plan." Kahn, _supra_ note 2, at 2000-09 (footnote omitted). The Code provides that "[a]fter the reorganization plan is confirmed, the debtor will receive a discharge from any pre-confirmation CERCLA liability not included in the plan." _Id._ at 2009. Therefore, "there is a strong incentive for the reorganizing debtor to include future CERCLA response-cost liabilities in the bankruptcy plan, and conversely, a strong incentive for the EPA to assert the claims against the reorganized debtor after the bankruptcy proceeding" _Id._ (emphasis added). The debate over contingent claims centers around the question of when the
A last *Franklin Signal* consideration manifested in the decisions of the majority of courts in abandonment cases is whether or not there are any unencumbered assets in the estate available to comply with an environmental clean up order. Many in this category have virtually said: “no funds, no compliance, no abandonment restriction.” One court, clearly influenced by the *Franklin Signal* decision, implied that the existence of other parties who could absorb the costs of clean-up created a presumption that the estate’s assets should in no way be utilized for compliance. Still another court has taken this unwillingness to expend estate funds to comply a step farther, refusing to force the trustee to use available unencumbered assets on clean up. It is true that the *Midlantic* court, by denying abandonment in the case, really put the trustee in a bind. He had to comply with the environmental laws and clean-up orders but had no assets to do this. The Court gave no guidance with regard to this matter. Since the Court did not make a determination as to the nature of unencumbered assets that the Chapter 7 trustee could use to comply with the law, it is fair to say that whether or not the lack of assets is a dispositive trigger for abandonment is still up in the air. The argument of the courts above, surprisingly, is sound and will not conflict with the *Midlantic* holding. As the court in *Oklahoma Refining* pointed out: “[t]o require strict compliance with State environmental laws under the facts of this case [no unencumbered assets] could create a bankruptcy case in perpetuity and fetter the estate to a situation without resolve.” The *Midlantic* Court would never had intended such a result.
C. A Midlantic Result With a Non-Midlantic Rationale

Five courts, In re Mowbray Engineering, Co.,\textsuperscript{183} In re Smith-Douglass,\textsuperscript{184} In re Better-Brite Plating,\textsuperscript{185} In re FCX, Inc.,\textsuperscript{186} and Leavell v. Karnes,\textsuperscript{187} have allowed an abandonment of property of the estate by a trustee, but only conditioned on the payment of administrative expenses to the agency performing the clean-up duties on the property.\textsuperscript{188}

Four of the courts in this category are just as guilty as their majority counterparts in reading Midlantic to require that there be “an imminent and identifiable” harm to the public before abandonment can be halted.\textsuperscript{189} However, their goal is far from the “abandonment at all costs” approach espoused by the majority of cases discussed above. Look at how the FCX court defines “imminent”: “[i]n holding that the danger is imminent, the court recognizes that the environmental threat may not be fully manifested for several years. Nevertheless, the danger is immediate in the sense that there is a present and real possi-

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\textsuperscript{183} 67 B.R. 34, 35-36 (Bankr. M.D. Ala. 1986).
\textsuperscript{184} Borden, Inc. v. Wells Fargo Bus. Credit (In re Smith-Douglass, Inc.), 856 F.2d 12 (4th Cir. 1988).
\textsuperscript{185} 105 B.R. at 918.
\textsuperscript{186} 96 B.R. at 55.
\textsuperscript{187} 143 B.R. at 219.
\textsuperscript{188} See Leavell, 143 B.R. at 219 (actual § 503(b)(1)(A) administrative expenses will be granted); FCX, 96 B.R. at 55 (trustee shall set aside $250,000 to pay for anticipated clean up costs); Better-Brite I, 105 B.R. at 917 (agency granted an administrative expense lien on the property for the value of the clean up, over and above secured creditors); Smith-Douglass, 856 F.2d at 13 (state agency entitled to administrative expenses, but the estate has no unencumbered assets); Mowbray, 67 B.R. at 36 (will be given a § 507 priority). By first allowing the environmental agencies to move in and clean up the property, and then permitting the formal abandonment, the courts are avoiding a problem Judge Gibbons pointed out in Quanta. 739 F.2d at 923-24 (Gibbons, J., dissenting). In his dissent, he criticized the majority for approving administrative expenses for clean up after abandonment. Id. He pointed out that after abandonment, “the cestui [trustee] has no interest in it [the property] and in turn no right to expend assets of the estate cleaning it up.” Id., see Page, supra note 52, at 362-63. On the other hand, an administrative expense lien granted for work subsequent to formal abandonment is a security interest that would survive the divestment while not intruding on the Takings Clause of the United States Constitution. See Kessler v. Tarrats, 466 A.2d 581 (N.J. Super. Ct. 1983), aff'd, 476 A.2d 326 (N.J. Super. Ct. 1984) (New Jersey’s superlien is constitutional because an agency granted such a lien as “improving” the collateral for other secured creditors).
\textsuperscript{189} Leavell, 143 B.R. at 218 (“[I]n order to comply with the mandate of Midlantic, the bankruptcy court must first determine whether conditions on the property pose an immediate and identifiable threat to the public health or safety.”); FCX, 96 B.R. at 54 (“Full compliance with all environmental laws is not required prior to abandonment, but abandonment is not authorized when there is an immediate threat to the public health and safety and an imminent danger of death and illness.”); Smith-Douglass, 856 F.2d at 16 (abandonment warranted when “the public health or safety is [not] threatened with imminent and identifiable harm”); Better-Brite I, 105 B.R. at 917 (if no imminent harm or danger to the public, abandonment is permitted).
bility of public exposure to those deadly substances if they are not removed.

What better way to justify a “conditional” abandonment than to say that there is a dangerous situation not warranting untrammeled abandonment, having defined imminent danger in the most expansive form imaginable.

These courts are trying to “sit on the fence” by allowing abandonment so the estate can rid itself of the future costs of maintaining the property, while at the same time appeasing the state and federal agencies which can recover some of their costs via an administrative expense priority. It is true that in the end, these “down the middle” results will probably be what the Midlantic court ultimately desired. However, there is a better way of achieving results: read what the opinion says.

D Going the Other Way: Reading Midlantic Too Strictly

In what seems like an epidemic, several courts have followed the others in misinterpreting the Midlantic mandate. The courts here, unlike those described earlier, cannot be accused of encouraging abandonment to the ultimate detriment of exasperated and irate state and federal agencies. They have instead, drawn the ire of Chapter 7 trustees who are forced to completely and unequivocally comply with environmental laws despite the fact that they may not have the estate funds to prevent a continuing violation.

As implied in this Note’s analysis of Midlantic’s three-part test, a violation of a state or federal environmental law does not per se preclude an abandonment authorization. Under Midlantic, if a violation is found to have occurred, but there are simply no unencumbered assets in the estate to comply with the law, abandonment is warranted despite the contravention of the law. This group of overzealous courts has ignored this implicit condition and have simply set up a prophylactic rule: broken law, no abandonment until compliance is achieved in its entirety. For instance, as the Stevens court emphasizes: “[t]he trustee was obligated to comply with valid Maine law regulating disposal of hazardous waste.”

This disregard of the Midlantic holding is as offensive as distortions carried out by the courts supporting abandonment.

190. FCX, 96 B.R. at 55 (emphasis in original).
192. Stevens, 68 B.R. at 782; see also Wall Tube, 831 F.2d at 122 (“In this case, the hazards were identified by the THDE’s series of inspections. Wall Tube’s trustee, under those circumstances, could not have abandoned the property.”); Peerless, 70 B.R. at 947-48 (“Under Midlantic the Trustee could not abandon the Peerless site in violation of CERCLA.”).
V. THE MODEL

This Note has argued that the post-Midlantic courts have abused the language of Midlantic to achieve whatever ends they desire. The goal of every court should be to avoid usurpation of the Supreme Court's authority in the legal scheme, while at the same time not losing sight of bankruptcy goals in the process. Such a balance is necessary because it is unlikely that the abandonment provision or any other part of the Code will be amended any time soon.193

The legal reasoning of the Midlantic court, comprised mostly of a distortion of statutory construction, is flawed. However, there is a strong argument that the end results are appropriate. This position has been taken by Thomas Jackson, the proponent of the persuasive "no conflict" theory.

Jackson contends that a debtor should have to fulfill the same environmental obligations under bankruptcy that he should have to comply with outside of bankruptcy.194 It may be argued that the opportunity for special treatment is a chief motive for filing. However, besides giving debtors the proverbial "fresh start," the Bankruptcy Code is designed to ensure that creditors are not "engaging in a destructive race to the debtor's assets."195 Once this "collectivization goal" is achieved, "the next step in bankruptcy analysis is to find the closest available nonbankruptcy analogy to what is occurring in bankruptcy, and to try to sort out the substantive rights of parties under that analogy."196 These goals should be paramount, and all others should be discouraged. A logical outgrowth of all of this is that there

193. On September 15, 1993, the Senate Judiciary Committee did approve an amended version of S. 540, and sent it off to the full Senate for consideration and a possible vote later in the year. Senate Judiciary Committee Approves Bankruptcy Reform Measure as Amended, BNA's BANKING REPORT (BNA), September 20, 1993, available in LEXIS, Nexis Library, Omni File. Among the many substantial proposals in the Bankruptcy Amendments Act of 1993 is the formation of "what the American Bankruptcy Institute calls a national 'blue-ribbon commission' to study the bankruptcy code and recommend reforms." Robert O'Brien, Bankruptcy Code Changes: The Good, The Bad ..., MERGERS & ACQUISITIONS REPORT, September 27, 1993, available in LEXIS, Nexis Library, Omni File. The measure is expected to pass the Senate easily, but the House has traditionally been a formidable hurdle for any bankruptcy reform. See Joseph D. Hutnryan, Reform Legislation Regains Momentum with Senate Vote, BANKING POLICY REPORT, October 4, 1993, available in LEXIS, Nexis Library, Omni File (the House rejected a similar bill in 1992). There is strong opposition to the legislation from private groups as well. Help a Senator to Rewrite Flawed Bankruptcy Law, CRAN'S NEW YORK BUSINESS, August 16, 1993 - August 22, 1993, available in LEXIS, Nexis Library, Omni File ("The National Bankruptcy Congress — a group of lawyers, judges and professors — opposes reform.").

194. Jackson, supra note 5, at 399; see also Butner v. United States, 440 U.S. 48, 55 (1978) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

195. Jackson, supra note 5, at 399.

196. Id.
should be a prevention of "forum shopping" so that debtors will enter bankruptcy for one of the legitimate reasons mentioned above, and not to play disruptive "hide and seek" games with obligations.

Jackson says that in cases of abandonment in a nonbankruptcy setting, an owner would probably not be able to abandon before complying with environmental orders and obligations. As Jackson mentions, "[a]s a matter of nonbankruptcy law, it [the State] may be able to prohibit any distribution of any of [the] Firm's assets in a dissolution to any creditor unless and until [the] Site is cleaned up." Additionally, the "State [probably] has the equivalent of a statutory lien on [the] Site itself, because any owner — whether acquiring title by gift, purchase, or foreclosure — will bear clean up responsibility." What should result then is a prohibition of abandonment in the bankruptcy forum until the environmental obligations are satisfied.

In light of the Midlantic decision, the goal of a bankruptcy court with regard to the abandonment of environmentally-impacted property by the Chapter 7 should be clear: restrict it as much as feasible and possible. The remaining part of the paper will be devoted to setting out a brief model that judges should adhere to in order to comply with Midlantic and the objectives of bankruptcy.

A. The Automatic Stay

At the start of the proceeding, the court will have made a determination of the applicability of section 362 to EPA/state agency efforts to enforce a clean up order. This determination, as noted by one commentator, involves the answering of two questions: (1) does this action by CERCLA or the state environmental agency fall within the police or regulatory exception of section 362(b)(4) and (2) if so, can this action be deemed an action to enforce a money judgment and therefore be prohibited by section 362(b)(5)? Overall, "[t]he jurisprudence indicates that the automatic stay is virtually useless in the face of CERCLA [or state agency] actions to enforce clean up mandates or to assess liability." Overall, "[t]he jurisprudence indicates that the automatic stay is virtually useless in the face of CERCLA [or state agency] actions to enforce clean up mandates or to assess liability."

B. Is the Property Burdensome?

The next consideration every court must take into account is whether the property is "burdensome" or of "inconsequential value

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197. Id. at 419.
198. Id.
200. Loesch, supra note 15, at 158.
and benefit to the estate."\textsuperscript{201} If the Chapter 7 trustee is unsuccessful in meeting this burden through a showing of an inability to sell the site in question, or the existence of numerous liens and various encumbrances burdening the property, or that the post-clean up value of the property is much lower than the anticipated clean up costs, the analysis must end here and abandonment must be denied.\textsuperscript{202}

C. Check for Assets

If there are no assets in the estate, a judge should consider dismissing the bankruptcy case right away. Several courts have pursued such a strategy\textsuperscript{203} because if the battle is simply over the regulatory debt, and there is difficulty procuring a Chapter 7 trustee who can adequately administer such a clean up, it may be better to dismiss for cause under section 707 of the Code\textsuperscript{204} and let state courts deal with the problem absent bankruptcy restrictions (i.e., the automatic stay). There will, most importantly, also be little if no prejudice to existing creditors as well.

D. The Three-Prong Midlantic Test

If the trustee passes the "burden" hurdle, the court must next reconcile the abandonment motion with \textit{Midlantic} by using the three prong approach. The courts should never assume that the test is satisfied or rejected without a hearing to let the parties present their views on the subject of compliance with \textit{Midlantic}. A bankruptcy judge may be overruled for ignoring such a hearing.\textsuperscript{205}

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\textsuperscript{202} It was indicated earlier in this Note that in most cases, a trustee's determination that the property is a burden or inconsequential is not disputed. The Sixth Circuit, however, emphasizes that § 554 was amended to read "inconsequential value and benefit" to the estate. This higher burden on the trustee, says the court, was instituted for a reason, and is something that the trustee should have to satisfy with truly substantive proof. \textit{In re K.C. Machine & Tool Co.}, 816 F.2d 238, 245 (6th Cir. 1987).
\textsuperscript{203} See \textit{In re Commercial Oil Service, Inc.}, 88 B.R. 126 (Bankr. N.D. Ohio 1987) (dismissal warranted under § 707(a), not § 305); \textit{In re 30 Hill Top Street Corp.}, 42 B.R. 517 (Bankr. D. Mass. 1984) ("Where a bankruptcy case is impossible to administer because of a lack of funds and the presence of a threat to public safety, a bankruptcy court has the duty to dismiss the case in order to return the case to a forum with appropriate authority and remedial powers."); \textit{In re Charles George Land Reclamation Trust, 30 B.R. 918} (Bankr. D. Mass. 1983) (dismissal was warranted because there were negligible assets available in the estate, outlandish clean up costs, and no trustee was willing to serve in this case).
\textsuperscript{204} 11 U.S.C. § 707(a) states: "[t]he Court may dismiss a case under this chapter only after notice and a hearing and only for cause, including ...." The reasons mentioned above are not mentioned in this list, but the word "including" in the statute indicates that the list is not exclusive.
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E. Abandon or Not?

The hierarchy of reasoning should be straightforward. If the *Midlantic* analysis warrants abandonment, the motion should be granted, with no questions asked. If the conditions on the site warrant a non-abandonment "verdict," one must move to a more specific level of questioning: whether or not there are enough unencumbered assets in the estate to comply with the clean up order and the applicable environmental laws.

The existence of sufficient unencumbered funds to effectuate a complete clean up will force the trustee to satisfy all of the estate's obligations. A lack of this minimum funding in the estate will warrant a different result. In this case, the court should authorize the trustee's conveyance of possessory interest in the polluted property to the environmental agency through section 725 of the Code.\textsuperscript{206} This unique solution to abandonment problems has been implemented by only one court,\textsuperscript{207} but its advantages are overwhelming. The clean up will be carried out by an agency that actually knows what it is doing,\textsuperscript{208} the trustee is temporarily relieved from any potential personal liability,\textsuperscript{209} and the grant of unsecured status to the agency (if they do not have a

\textsuperscript{206} 11 U.S.C. § 725 (1993) ("After the commencement of a case under this chapter, but before final distribution of property of the estate under section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title.").


\textsuperscript{208} Id. at 220.

\textsuperscript{209} Id. A trustee's potential personal liability for violations of environmental obligations that may occur on this polluted property is a seriously underdeveloped doctrine. What trustees are worrying about is first, 28 U.S.C. § 959(b)'s mandate for the trustee to comply with state laws when "operating" the site. Also, there are statutes that impose strict liability on those who operate a site for the costs of an environmental clean up and relevant damages. CERCLA is one of these. Only two courts have attempted to judicially define the scope of this liability in the environmental context. The first, State v. Better-Brite Plating, Inc., 168 Wis. 2d 363, 483 N.W. 2d 574 (Wis. 1992), consolidated existing but sparse caselaw on general trustee personal liability and articulated a rule of thumb: if the trustees do not act outside the scope of their authority when violating any applicable law, they would not be subject to state court jurisdiction in their personal capacities. Id. at 583-84. The Wisconsin Supreme Court said: "the court of appeals noted the 'devastating impact' that such a holding would have on the pool of persons willing to serve as trustees. We find such public policy considerations compelling." Id. at 583. This case was cited approvingly in the federal case, In re Sundance Corp., 149 B.R. 641 (Bankr. E.D. Wash. 1993). Here, a Chapter 11 receiver was not held to be personally liable for clean up costs in connection with the release of hazardous substances at a mortgagor's orchard. The court held that the receiver would not be personally liable to the estate even though he had engaged in abnormally dangerous activities on the site, acting in the scope of his authority shielded him from liability under state environmental laws, and such a receiver would be granted derivative judicial immunity under CERCLA for being a state court receiver and bankruptcy custodian. Id. Even with this favorable precedent, a trustee still cannot always count on this immunity. That is why a conveyance such as this will help. See generally Jeffery, supra note 40; E. Allan Tiller, *Personal Liability of Trustees and Receivers in Bankruptcy*, 53 AM. BANKR. L.J. 75 (1979).
superlien, either federal or state) for the clean up will not disturb the priority status of other creditors. After the clean-up, the estate still has title and then can do whatever it wants with it (i.e., sell it off, abandon it, etc.).

**F. What Will the Agencies Get Out of This?**

The clean up, conducted and supervised by the EPA or the state environmental agency, will be granted and is entitled to an unsecured claim. Aside from being justified by statutory and case law, there will be no incentive for the EPA to wait forever to obtain reimbursement for administrative expenses. The EPA will be designated an unsecured creditor whether or not there is an abandonment, and the agency will want to get in and clean up the property as soon as possible. This is inevitable, since the longer they wait the more they will have to pay to clean it up later on. A bankruptcy court should be not be responsible for compensating for the mistakes of states and the federal government which will not institute higher bonding requirements, give environmental agencies a more powerful lien, or simply amend the Code itself.

**CONCLUSION**

The controversy over the role of section 554 in the contravention of environmental laws is far from over. With the Supreme Court’s *Midlantic* decision solving nothing, both because of its generality and the fact that lower courts are ignoring its language anyway, the best thing anyone can do is simply get back to basics: read what the *Midlantic* decision really says, and add a touch of knowledge about what we are actually trying to do by having a bankruptcy system. Following such a mandate will make for more consistent and judicious results.

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211. See supra note 176 and accompanying text.
212. Johannsen, supra note 48, at 226 ("If the [performance] bonding is inadequate to cover the actual cleanup costs, the fault lies in the bonding requirements, not the Bankruptcy Code.").